APPEAL NO. 010270

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 12, 2001. The hearing officer determined that the recommended spinal surgery had not been concurred in by either of the second opinion doctors.

The appellant (claimant) appeals, contending that her second opinion spinal surgery doctor had in fact concurred in the recommended surgery in an amendment. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant sustained a compensable low back spinal injury in a slip-and-fall accident on _____ (all dates are 2000 unless otherwise noted). Dr. G, the claimant's treating doctor, in a Recommendation for Spinal Surgery (TWCC-63) dated August 31, recommended spinal surgery in the form of a decompressive laminectomy at L3-4 and L4-5, a fusion at those levels with instrumentation (a "threaded fusion cage"), and bone graft. Dr. P, the carrier's second opinion doctor, in a report of evaluation performed on September 27, did not concur with the recommended surgery; said the procedure codes were incorrect; and concluded that there was no "indication for lumbar fusion."

Dr. T, the claimant's second opinion doctor, in a report dated October 31, stated that he recommended a "hemi-laminectomy diskectomy at L3-4 and L4-5." At that point, Dr. T did not comment on the fusion with instrumentation. The Texas Workers' Compensation Commission (Commission), by letter dated November 7, advised the parties that neither second opinion doctor had concurred in the proposed surgery. Subsequently, in an "addendum" dated December 21, Dr. T stated:

> Should decompression at L3 and L4 leave her with a degree of instability as assessed intraoperatively by excessive and abnormal motion between the vertebral bodies a posterolateral or posterior lumbar inner body fusion could certainly be entertained but this would be a decision to be made at the time of surgery.

Dr. G, in an undated reply note "partially agrees with [Dr. T]."

The carrier's liability for spinal surgery costs is dependent on the concurrence of at least one of the two second opinion doctors (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(b) (Rule 133.206(b)) and of the three recommendations (the surgeon and the two second opinion doctors) presumptive weight will be given to the two doctors who had the same result. Rule 133.206(k)(4). In order to qualify as a concurrence under Rule 133.206(a)(13), the second opinion doctor must agree on the proposed type of spinal

surgery and the region (cervical, thoracic, lumbar, or sacral) of the spine involved. However, the second opinion doctor does not have to agree on the approach (anterior, posterior, instrumentation, cages, etc.) or on the number of levels within the region in which the recommended surgery will be performed. Texas Workers' Compensation Commission Appeal No. 002005, decided October 17, 2000. Thus, the critical question becomes whether Dr. T's report constitutes a concurrence that the decompression and fusion surgery is needed. Initially, Dr. T had not commented on the fusion at all. After the Commission held that that opinion was a nonconcurrence, Dr. T amended the report to indicate a conditional concurrence based on the "degree of instability" found at the time of decompression. Dr. G, the treating surgeon, only "partially" agrees with Dr. T. We agree with the hearing officer that Dr. T has never concurred in the need for a fusion, at best saying a "fusion could be entertained" after the decompression. Consequently, we hold that the hearing officer properly determined that Dr. T's opinion is not a concurrence as that term is defined in Rule 133.206(a)(13).

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge